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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052451
Party	Defendant Hollywood Media Corp.
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Date	07/09/2010
Attachments	Respondent's Answer.pdf ( 9 pages )(114966 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Mark: **XANDER**  
Int'l Class: 016  
Registration No.: 2,044,364  
Registered: March 11, 1997

<b>Robert E. Randall, Jr.</b>	)	
an individual,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No.: 92052451
	)	
<b>HOLLYWOOD MEDIA CORP.,</b>	)	
a Florida corporation,	)	
	)	
Respondent.	)	

**RESPONDENT'S ANSWER TO PETITION TO CANCEL**

Hollywood Media Corp. ("Respondent"), by and through its attorneys, Foley & Lardner LLP, in response to Robert E. Randall, Jr.'s ("Petitioner") First Amended and Restated Petition to Cancel ("Petition") filed on May 17, 2010, states as follows:

**ALLEGATION Unnumbered Paragraph 1:** *On May 11, 2010, Petitioner Robert E. Randall, Jr., of 2727 Klamath Drive, Rocklin, California 95765 ("Petitioner") filed a Petition to Cancel the above-referenced mark ("Xander" Mark) with the United States Patent and Trademark Office, before the Trademark Trial and Appeal Board.*

**RESPONSE Unnumbered Paragraph 1:** Respondent acknowledges receipt of the present Petition to Cancel its mark XANDER. Otherwise, Respondent is without knowledge or information sufficient to form a belief as to the truth of the Petitioner's identity or address information as contained in Unnumbered Paragraph 1 of the Petition.

**ALLEGATION Unnumbered Paragraph 2:** *At the time of the initial filing, Petitioner accidentally failed to attach Exhibit 6, consisting of the first ten pages of a Google search for “Xander” (“Exhibit 6”) to the original Petition. Petitioner is filing this First Amended and Restated Petition to Cancel in order to ensure the proper attachment of Exhibit 6.*

**RESPONSE Unnumbered Paragraph 2:** Respondent acknowledges receipt of the present Petition to Cancel its mark XANDER. Otherwise, Respondent is without knowledge or information sufficient to form a belief as to the truth of the remaining information alleged in Unnumbered Paragraph 2 of the Petition.

**ALLEGATION Unnumbered Paragraph 3:** *Petitioner believes he will be damaged by the above-identified registration and has standing to bring this Petition for Cancellation (“Petition”) because the existence of the XANDER Mark has already resulted in two Office actions refusing registration of Petitioner’s mark, ZANDER (Serial Number 77794164), (“ZANDER” Mark) (See Exhibit 1) and Petitioner has a reasonable belief that if the Office does not cancel the registration of the XANDER Mark Petitioner will be unable to register the ZANDER Mark. These facts constitute sufficient standing under TBMP § 309.3(b).*

**RESPONSE Unnumbered Paragraph 3:** Respondent denies any allegation or inference of damage in Unnumbered Paragraph 3 of the Petition. Respondent is without knowledge or information sufficient to form a belief as to the truth of any of the remaining information alleged in Unnumbered Paragraph 3 of the Petition.

**ALLEGATION Paragraph 1:** *As demonstrated in paragraphs 2-9 below, the XANDER Mark has not been actively used in commerce in more than three years. A prima facie case of abandonment can be established “by showing proof of nonuse for three consecutive years.” 15 U.S.C. §1127, On-Line Careline, Inc. v. Am. Online Inc., 229 F.3d 1080,1087 (Fed. Cir. 2000).*

*Establishing a prima facie case "eliminates the challenger's burden to establish the intent element of abandonment as an initial part of [his] case," creating a rebuttable presumption that the trademark owner has abandoned the mark without intent to resume use. Id. See also CUMULUS MEDIA v. Clear Channel Communications, 304 F. 3d 1167, 1177 (11th Circuit 2002).*

**RESPONSE Paragraph 1:** Respondent denies the allegation that the XANDER Mark has not been actively used in commerce in more than three years to the extent that it implies that Respondent has abandoned its registered XANDER Mark. The remaining statements in Paragraph 1 of the Petition are legal citations and legal conclusions to which Respondent need not respond.

**ALLEGATION Paragraph 2:** *The XANDER Mark was originally registered as a property of Tekno Comics, a short-lived comic book company that existed from 1995 to 1997. See Exhibit 2; see also online at [http://en.Wikipedia.org/wiki/Tekno\\_Comix](http://en.Wikipedia.org/wiki/Tekno_Comix). The current owner of the XANDER Mark registration is the apparent legal successor in interest to Tekno Comics, and acquired the intellectual property rights of Tekno Comics, including without limitation the XANDER Mark, when it acquired the defunct comic book company in 1997.*

**RESPONSE Paragraph 2:** Respondent denies the allegations in Paragraph 2. More specifically, Respondent denies the allegations that its XANDER Mark was originally registered as a property of Tekno Comics or that Tekno Comics was a predecessor in interest to the XANDER Mark.

**ALLEGATION Paragraph 3:** *During its short existence, Tekno Comics used the XANDER Mark in association with a series of comic books designed and written by Gene Roddenberry, originally titled "Lost Universe" and later retitled "Xander in Lost Universe"*

*(collectively, the “Xander Series”). The Xander Series contained only eight (8) issues, all of which were published between November 1995 and July 1996. The comic book retailer NewKadia.com specifically identifies the series’ publication dates as: “First Issue #1 – November 1995, Last #8 – July 1996. See Exhibit 3; see also online at: [http://www.newkadia.com/?Gene\\_Roddenberrys\\_Xander\\_in\\_Lost\\_Universe\\_Comic-Books=1559](http://www.newkadia.com/?Gene_Roddenberrys_Xander_in_Lost_Universe_Comic-Books=1559). Petitioner’s research reveals no other use of the XANDER Mark in association with comic books or graphic novels after July 1996, a period of fourteen (14) years.*

**RESPONSE Paragraph 3:** Respondent denies the allegation or inference that its XANDER Mark was originally registered as a property of Tekno Comics or that Tekno Comics was a predecessor in interest to the XANDER Mark. Respondent admits that the XANDER Mark was used in connection with a series of comic books designed and written by Gene Roddenberry titled “*XANDER in Lost Universe*,” eight issues of which were published between November 1995 and July 1996. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the statements made by NewKadia.com or the scope of, or information revealed by, Petitioner’s research and, therefore, denies any allegations, inferences or conclusions associated with the same.

**ALLEGATION Paragraph 4:** *Petitioner’s research also revealed a paperback novel, titled Gene Roddenberry’s Xander in Lost Universe (“Xander Novel”), published in 2001. See Exhibit 4. The novel was written by John Peel and appears to be a licensed novel based upon the Tekno Comics Xander Series. The novel was not published by either Tekno Comics or the current owner of the registration, but the evidence suggests and Petitioners reasonably believe that the novel represents a “use in commerce” licensed or approved by the predecessor-in-interest to the current owner of the registration of the XANDER Mark. This 2001 publication appears to be the*

*final use of the XANDER Mark in commerce. Petitioner has been unable to find any use of the XANDER Mark by its owners or licensed third parties more recently than 2001, which means that the XANDER Mark has not been used in commerce for at least nine (9) years.*

**RESPONSE Paragraph 4:** Respondent admits the allegations that a novel titled *Gene Roddenbury's Xander in the Lost Universe* was written by John Peel and published in 2001 (“Xander Novel”) and that the Xander Novel was a licensed “use in commerce” authorized by Respondent. Respondent denies the allegations that the “Xander Novel” was the final use of the XANDER Mark in commerce and/or that the XANDER Mark has not been used in commerce for at least nine (9) years. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the scope of, or information revealed by, Petitioner’s research and, therefore, denies any allegations, inferences or conclusions associated with the same.

**ALLEGATION Paragraph 5:** *Petitioner was unable to discover any use of the XANDER Mark in connection with book covers or any of the goods and services listed in the registration aside from the Xander Series and the Xander Novel. A Google search for “Xander in Lost Universe” returns only references to sellers offering used copies of the 1995-1996 Xander Series and a reference to the Xander Novel. See Exhibit 5. The only current offerings of the Xander Series or the Xander novel are made by private third parties and resellers of used and rare comic books. See, generally, Petitioner’s Exhibits and attached evidence.*

**RESPONSE Paragraph 5:** Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the scope of, or information revealed by, Petitioner’s research and, therefore, denies any allegations, inferences or conclusions associated with the same. Respondent denies the allegation that the only current offerings of the

“Xander Series” or the “Xander Novel” are made by private third parties and resellers of used and rare comic books to the extent it implies that Respondent has abandoned its registered XANDER Mark.

**ALLEGATION Paragraph 6:** *The XANDER Mark does not appear to be used in any official marketing or advertising. Petitioner has been unable to locate any official marketing or advertising of goods and services bearing the XANDER Mark or any other use of the XANDER Mark in commerce since the 2001 Xander Novel. The first ten pages of a Google search for “Xander” do not contain even a single reference to the XANDER Mark. See Exhibit 6. In fact, the first reference to “Xander (comic book character)” appears at page 15, but even this reference does not refer to the XANDER Mark. The reference links to a comic book published in 2007 by Dark Horse Comics as part of the Buffy the Vampire Slayer Series, featuring an entirely different character, also named “Xander.” See Exhibit 7.*

**RESPONSE Paragraph 6:** Respondent denies the allegation that the XANDER Mark has not been used in any official marketing or advertising to the extent it implies that Respondent has abandoned its registered XANDER Mark. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the scope of, or information revealed by, Petitioner’s research and, therefore, denies any allegations, inferences or conclusions associated with the same.

**ALLEGATION Paragraph 7:** *Petitioner’s attorney contacted legal counsel for the holder of the XANDER Mark requesting information about the current status and use of the mark, to confirm that the XANDER Mark is inactive as the evidence suggests, but received no direct response from the mark holder. Counsel for the XANDER Mark holder indicated that he*

*had forwarded the request for information to his client, but no response was received by Petitioner.*

**RESPONSE Paragraph 7:** Respondent denies the allegations that the XANDER Mark is inactive and/or that the evidence suggests that the XANDER Mark is inactive. Respondent admits only the allegations set forth in Paragraph 7 of the Petition regarding communications between Petitioner's attorney and Respondent's legal counsel.

**ALLEGATION Paragraph 8:** *The XANDER Mark does not appear to have been used for any purposes in at least the past three (3) years and more likely the last 8-9 years. Petitioners could find no evidence of its use in commerce by the mark holder or licensed third parties since publication of the 2001 novel, which does not appear to have been reprinted or published after the end of 2001. Failure to actively use or market the XANDER Mark in commerce between 2001 (or, at the latest, 2002) and 2010 constitutes more than the three-year period necessary to establish a prima facie case for abandonment justifying cancellation of a mark by the Office.*

**RESPONSE Paragraph 8:** Respondent denies the allegations that the XANDER Mark has not been used for any purposes in the last three (3) years and/or the last eight to nine (8-9) years to the extent it implies that Respondent has abandoned its registered XANDER Mark. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding the scope of, or information revealed by, Petitioner's research and, therefore, denies any allegations, inferences or conclusions associated with the same. The last sentence of Paragraph 8 of the Petition is a legal conclusion to which Respondent need not respond.

**ALLEGATION Paragraph 9:** *Based on this statement and the attached Exhibits, all of which are hereby incorporated by reference as if fully set forth herein, Petitioner believes that*



*the XANDER Mark has been abandoned and requests that the Office cancel the XANDER Mark's registration.*

**RESPONSE Paragraph 9:** Respondent denies the allegations set forth in Paragraph 9 of the Petition. More specifically, Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements, the source of the exhibits, or the scope of, or information revealed by, Petitioner's research in assembling the exhibits, and, therefore, denies any allegations, inferences or conclusions associated with the same.

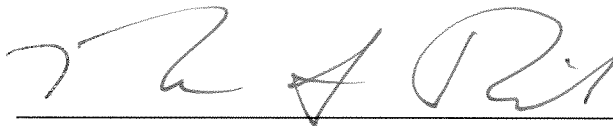
**AFFIRMATIVE DEFENSES**

1. As a first complete affirmative defense, Respondent states that Petitioner has failed to state a claim upon which relief may be granted.

WHEEFORE, Respondent prays that Petitioner's petition be denied.

Respectfully submitted,

FOLEY & LARDNER LLP

A handwritten signature in black ink, appearing to read 'Norm J. Rich', is written over a horizontal line.

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Attorneys for Respondent,  
Hollywood Media Corp.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing Respondent's **Answer to Petition to Cancel** was served on the counsel for Petitioner this 9th day of July, 2010, by electronic transmission to [sspan@ls4law.com](mailto:sspan@ls4law.com), and by mailing the same, via first class U.S. mail, postage prepaid, to the Petitioner's counsel, addressed as follows:

Susan L. Spann  
LLWEWLLYN SPANN, ATTORNEYS AT LAW  
5530 Birdcage Street, Suite 210  
Citrus Heights, California 95610

A handwritten signature in cursive script, appearing to read "Maria V. Fry", is written over a horizontal line.

Maria V. Fry  
Foley & Lardner LLP